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No. 92-8556

In The
Supreme Court of the United States

October Term, 1993

— ♦ —
KENNETH O. NICHOLS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

— ♦ —
On Writ Of Certiorari
To the United States Court of Appeals
For The Sixth Circuit
— ♦ —

REPLY BRIEF OF PETITIONER
— ♦ —

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ARGUMENT

Petitioner claims that his 1983 Georgia state court conviction for drunk driving, which was used under the Federal Sentencing Guidelines to enhance his current sentence by twenty-five months, was an uncounseled conviction within the meaning of *Baldasar v. United States*, 446 U.S. 222 (1980). The United States argues that the Georgia conviction may be used for sentence enhancement because petitioner has not met the demanding burden of proving as a factual matter that he did not waive counsel in the Georgia Proceeding. Petitioner submits that, as the District Court found, he has met the burden of showing that the Georgia conviction was uncounseled, and that the record of the Georgia proceeding reflects no waiver of counsel.

There was sufficient evidence before the District Court to support that court's finding that petitioner's Georgia conviction was uncounseled and that there was no valid waiver of the right to counsel. The burden the government seeks to impose on petitioner, which would require proof of a lack of waiver through oral testimony or affidavits, is unwise and inappropriate. The District Court's approach recognizes that *Baldasar* challenges are not true collateral attacks. In order to avoid the necessity of holding intricate and time-consuming factual hearings every time a *Baldasar* claim is raised, this Court should adopt the District court's reasoning that, when a *Baldasar* claim is made, only two questions are relevant: 1) was the petitioner represented by counsel, and 2) does the record reflect a valid waiver of counsel?

The District Court properly found that no waiver of counsel has been shown.

The sentencing court below was informed of petitioner's Georgia conviction in the Presentence Report. The probation officer who prepared the report detailed the offense charged and petitioner's sentence and then stated:

"No information was available from the Court record as to whether the defendant was represented by an attorney. When Mr. Nichols was asked about the case, he indicated that he had contacted an attorney and had been informed by that attorney that he did not need to be represented at the hearing, since he would be pleading *nolo contendere*." [Presentence Report at 7].

In a memorandum objecting to the use of the Georgia conviction to enhance sentence, petitioner argued that the conviction had been uncounseled and the probation officer's report indicated that no information was available from the court record as to whether defendant was represented by counsel. [Presentence Report page 7] This lack of mention of counsel necessarily means that the probation officer who prepared the report was unable to find anything on the record showing a waiver of counsel, because any reference to a waiver of counsel would have answered the question of whether petitioner had been represented. The government did not put forth any evidence that petitioner had been represented by counsel, and did not allege that any existing state court record reflected a waiver of counsel. The district Court ultimately decided to consider this prior conviction in sentencing petitioner, distinguishing *Baldasar*, but did not

hold that the conviction was uncounseled within the meaning of *Baldasar*. According to the District Court, the defendant has the burden of showing that a prior conviction is constitutionally invalid once the Government has borne the initial burden of proving the conviction. See Memorandum of Judge A. Edgar, Joint Appendix [JA] at 9, citing *United States v. Unger*, 915 F.2d 759, 761 (1st Cir. 1990). The District Court went on to find that petitioner had met this burden.

"The defendant here asserts that his DUI conviction in 1983 was uncounseled. It is not contested that the defendant did not have counsel. The proof is unclear as to whether he may have validly waived his right to counsel. The Court determines on the basis of the facts before it, however, that he did not waive that right in connection with the 1983 DUI case. Such a waiver must be intelligently and understandingly made, and cannot be presumed from a silent record. *Boyd v. Dutton*, 405 U.S. 1 (1972)." *Id.* JA at 9-10.

This clear finding of fact by the District Court is adequately supported by the evidence before the court. The District Judge was in the unique position of having access to the probation officer who prepared the report, and was able to decide whether the investigation into the existence of a relevant state court record had been sufficiently thorough. The District Court then concluded that petitioner's allegation that he was uncounseled, combined with the lack of any state court record showing either that petitioner had been represented by counsel, or that counsel had been affirmatively waived, was sufficient evidence to meet petitioner's burden. If the District

court had found this evidence inadequate, the Court would have had to go behind the existing record and entertain testimony and affidavits pertaining to what had actually happened in the 1983 Georgia proceeding. Given the difficulty of conducting retrospective fact finding, combined with the expenditure of judicial resources that would be required to go behind the record in every case where the presence of counsel or waiver might be an issue, the District Court properly exercised its discretion by deciding to make its decision on waiver based on the information appearing on the record.

Petitioner met the Burden of producing evidence establishing that his prior conviction was uncounseled and that the record does not reflect any waiver.

The United States relies on *Parke v. Raley*, 113 S.Ct. 517 (1992) to argue that petitioner's burden should be high, and that his failure to insist on adducing testimony before the District Court should preclude him from raising his constitutional claim. The government's reliance on *Parke v. Raley*, however, depends on characterizing petitioner's claim as a collateral attack. Petitioner is not, in fact, collaterally attacking the Georgia conviction within the usual meaning of that term. Petitioner does not claim that the Georgia conviction was unconstitutional, that his sentence was unconstitutionally imposed or, indeed, that Georgia has violated his rights in any way. Petitioner's quarrel is with the United States for depriving him of more than two years of freedom on the basis of a conviction that neither he nor the state of Georgia had reason to believe would be the predicate for such a severe consequence.

In an ordinary collateral attack, the burden placed on a petitioner to establish the unconstitutionality of a previous conviction is heavy because federal courts are properly reluctant to void state court convictions. Collateral attacks try to strip away more than just the presumption of constitutionality of a conviction; they challenge the state courts' ability to be fair and to fulfill their obligation to ensure that defendants' constitutional rights have been honored; they may, by voiding a conviction, subject the state to civil liability for having mistakenly punished an individual who should not have been convicted; they often entail intrusive examination into whether the state's record of a proceeding accurately reflects what actually happened in that proceeding. None of these dangers is presented by this case or by the usual *Baldasar* challenge. Because of the Court's decision in *Scott v. Illinois*, 440 U.S. 367 (1979), petitioner is challenging a particular use of a state court conviction, but not the process by which the state obtained that conviction. The government deplores *Baldasar's* creation of "hybrid" convictions, valid for some purposes but invalid for others; it is actually *Scott* that created such hybrids by declaring that the right to counsel exists only if a defendant is actually incarcerated. If the Court is dissatisfied with the existence of such a hybrid, the Court should, as petitioner argued in the brief previously submitted, consider overruling *Scott*. If *Scott* continues to define the state's obligations concerning counsel as contingent on whether incarceration is imposed, then the question of constitutionality of a state court conviction will continue to be separate from the question of whether that conviction may be used as a

predicate for imprisonment. When only the latter question is raised, it is inappropriate to impose the highest of all possible burdens on those who raise the claim.

In *Parke v. Raley*, the Court upheld a Kentucky recidivist sentencing scheme under which, once the government has proved the existence of an eligible conviction, defendant has the burden of producing some evidence that the conviction was not constitutionally obtained. "If the defendant refutes the presumption of regularity, the burden shifts back to the government affirmatively to show that the underlying judgment was entered in a matter that did, in fact, protect the defendant's rights." *Id.* at 520. The United States argues that the Court's decision in *Raley*, that the Kentucky scheme did not deny defendant's due process, should lead the Court to impose not only a burden of production, but a heavy burden of proof on those who wish to raise challenges under *Baldasar*.

Petitioner submits that he had met the burden Kentucky would have imposed. In *Raley*, the issue was not whether the Kentucky defendant had been represented (it was conceded that he was represented), but whether the plea allocution had been constitutionally adequate. The defendant alleged that the allocution could not be shown to be adequate because no transcript of the allocution existed. Once the defendant had made that allegation, the State introduced evidence of a form waiver of rights for that very state court proceedings, signed by defendant. Defendant testified that he did not recall what had been said at the allocution, and did not recall signing the waiver form. In light of this evidence, the Kentucky court

held that the government had met its burden of persuasion, and this court upheld the finding.

In this case, petitioner met the burden of production by alleging that his prior conviction was uncounseled. The District Court had before it this allegation and the Presentence Report's determination that no recorded reference to waiver could be found in the State Court records. Unlike *Raley*, the government introduced no evidence relevant to the waiver issue at all. Petitioner submits that he has met any burden of production or even burden of proof that may fairly be imposed upon him. To require petitioners to testify about waiver would, in all likelihood be as little help as *Raley's* testimony about his plea allocution. The issue of waiver should be decided, not by testimony, but by reference to the State court records to see whether the right to counsel was affirmatively waived. Any greater requirement would impose demands that might frequently prove impossible to meet. If a petitioner, like petitioner Nichols, was unrepresented by counsel in the State Court proceedings, he is unlikely to have understood or to remember a plea allocution in sufficient detail to state reliably what was said in court. There is no defense attorney; the prosecutor is unlikely to remember a particular *nolo contendere* plea in a DUI case years ago; there is no source of reliable information other than the state court record. As the United States describes, Georgia, under its own procedures, generally undertakes to keep such records. In the ordinary case, the state court records would be a simple and dispositive referent. The record below does not indicate whether the relevant state court records from Georgia were simply missing, or whether a record does exist that fails to

mention a waiver of counsel in a context where it would have been expected to appear had there been one. In this unusual circumstance, the District Court was correct in relying on the silence of the record as inadequate to establish waiver. Treating the record as dispositive may also have the advantage of encouraging the state courts to keep careful records about waiver of counsel, as Georgia usually does, and thus obviating the need for live testimony about an issue that should have a simple answer. In *Raley*, the defendant argued that the absence of transcript of his plea proceeding should preclude a finding of waiver despite the fact that the government introduced a signed waiver form. Here, there is no record of waiver at all, and the government introduced nothing to justify the District Court in attempting to go behind the absent record.

There is no reason for the Court to impose a greater burden on petitioner than Kentucky imposed on defendant's challenging predicate convictions. As pointed out above, petitioner is not mounting a full-scale collateral attack on his prior conviction. His claim is a simple one, which, unlike *Raley's*, does not require any factual development.

Many of the state courts to have considered the issue have held that the burden of establishing that there was no waiver of counsel in *Baldasar* cases should be on the prosecution. See e.g., *Bilbrey v. State*, 531 So.2d 27 (Ct. Crim. App., Ala. 1988); *Panenen v. State*, 711 P.2d 528 (Alaska 1985); *State v. Natoli*, 764 P.2d 10 (Ariz. 1988); *Neville v. State*, 848 S.W.2d 947 (Ark. 1993); *People v. Finley*, 568 N.W.2d 412 (Ill. App. 3d Dist. 1991); *State v. Lawrence*, 600 So.2d 1341 (Ct. App. La. 1991); *People v. Stratton*, 384

N.W.2d 83 (Ct. App. Mich. 1985); *State v. Reimers*, 496 N.W.2d 518 (Neb. 1993); *State v. Ulibarri*, 632 P.2d 746 (N.M. 1981); *State v. Randen*, 497 N.W.2d 107 (S.D. 1993); *State v. O'Brien*, 666 S.W.2d 484 (Ct. Crim. App. Tenn. 1984); *Sargent v. Commonwealth*, 360 S.E.2d 895 (Va. 1987). Those states apparently allocating a share of the burden to the defendant, see, e.g., *People v. Roybal*, 618 P.2d 1121 (Colo. 1980); *State v. Beach*, 592 So.2d 237 (Fla. 1992); *State v. Beloit*, 844 P.2d 18 (Id. 1992); *Frame v. State*, 719 S.W.2d 173 (Ct. App. Ky. 1986); *State v. Fussy*, 467 N.W.2d 601 (Minn. 1991); *In re: Kean*, 520 A.2d 1271 (R.I. 1987); *State v. Triptow*, 770 P.2d 146 (Ut. 1989), do not place that burden so high as to be insurmountable. These courts often describe the defendant's burden as only a burden of production, like the Kentucky scheme considered in *Raley*, with the ultimate burden of persuasion on the prosecution, see, e.g., *Roybal*, *supra* (Colo.); *Beloit*, *supra* (Id.); *Frame*, *supra* (Ind.); *Triptow*, *supra* (Ut.) see also *Mansfield v. Champion*, 992 F.2d 1098, 1105-06 (10th Cir. 1993) (describing a similar Oklahoma scheme).¹

¹ Some federal cases have applied *Parke* in ruling that federal defendants who wish to challenge the constitutionality of a prior conviction may not rely on a silent record as sufficient support for their claim that their earlier convictions should be voided because their plea allocations were constitutionally defective, see, e.g., *United States v. Mulloy*, 3 F.3d 1337 (9th Cir. 1993); *United States v. Wicks*, 995 F.2d 964 (10th Cir. 1993), or because of errors at trial, see *United States v. Isaacs*, ___ F.3d ___, 1993 WL 210537 (1st Cir. 1993). Even if these cases are a proper interpretation of *Raley*, the context of a *Baldasar* claim is clearly distinguishable, because, as described above, petitioner does not challenge the constitutionality of the state court conviction, and does not seek to go behind what appears on the record.

For similar reasons, the Court should not adopt the government's proposal that petitioner should have to prove that he was indigent in Georgia in 1983 before he can raise a claim about the government's current use of the Georgia conviction. This proposal again misconceives the nature of petitioner's argument. Petitioner does not argue that Georgia denied him his right to counsel by refusing to assign him counsel in the face of indigency. He argues that the United States should not be permitted to use an unconstitutionally unreliable conviction. Not having known that there might be far more than a \$250 fine hinging on his decision, petitioner took the advice of the lawyer he consulted and neither hired counsel nor sought assigned counsel. It would be extraordinarily difficult for Nichols or for others in his situation to establish, eight or ten years later, the exact state of their finances in 1983. Petitioner never needed to reach the point of examining his own finances to decide whether to seek counsel because he believed that a person in Georgia in his situation did not require counsel. Defendants facing similar decisions in other states would have another reason for never asking themselves whether to request assigned counsel: under *Scott*, they would not have any right to counsel. Therefore, to require proof of indigency would be to require proof of a fact the never became relevant in the state court proceeding and is not relevant now to the question of whether the government may use the uncounseled conviction.

The government's argument that the unreliability of the conviction should be considered irrelevant because due process protections at sentencing have traditionally

been less rigorous than at trial ignores the fact that petitioner was sentenced under the Federal Sentencing Guidelines. This is not a case where the sentencing court below decided to consider a defendant's past conduct as part of the sentencing decision. It is the conviction, not the conduct, that is an issue, and that led petitioner's sentencing range to be increased by the twenty-five months he is now being required to serve. Petitioner is not asking this Court, and did not ask the Courts below, to immunize him from consideration of his prior conduct during sentencing. Petitioner is making a simple claim that does not require inquiry into what happened in Georgia in 1983: no state court record shows that he either had or duly waived counsel during a proceeding that has provided a basis for a substantial period of incarceration.

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

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